Office-Supreme Court, U.S.
FILED
DEC 14 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 598

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corporation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950, *Petitioners*,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Respondent*.

PETITIONERS' REPLY BRIEF.

EUGENE R. JOHNSON,
DONALD G. BESTE,
First National Bank Building,
Peoria, Illinois,

JESSE CHOPER,
Attorneys for Petitioner Peoria and Pekin Union Railway Company.

ROBERT S. KIRBY,
135 East 11th Place,
Chicago 5, Illinois,
Attorney for Petitioner Illinois Central Railroad Company.

JOHN M. ELLIOTT,
First National Bank Building,
Peoria, Illinois,
Attorney for Petitioners Peoria and Eastern Railway Company and Chicago and Illinois Midland Railway Company.

W. S. BOCMAN,
STEPHEN L. SEFTENBERG,
120 West Adams Street,
Chicago 3, Illinois,
Attorneys for Petitioner United States Trust Company of New York, as Trustee.

Of Counsel:
MILLER, WESTERVELT & JOHNSON,
WILSON & MCILVAINE.

THE GUTHROP-GARDEN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
I. North Western's "Restatement of the Case"	1
II. North Western's Supersession Argument	5
III. North Western's Pooling Argument	7
IV. North Western's Antitrust Argument	8
Conclusion	10

CITATIONS.

Cases.

Andrew G. Nelson, Inc. v. United States, 355 U. S. 554 (1958)	4
Central Transfer Co. v. Terminal R. Ass'n of St. Louis, 288 U. S. 469 (1933)	9
Gallagher v. Pennsylvania R. Co., 160 I. C. C. 563 (1929)	6
Georgia v. Pennsylvania R. Co., 324 U. S. 439 (1945)	5
Gulf, M. & O. R. Co. v. Illinois Central R. Co., 225 F. 2d 816 (5th Cir., 1955)	6
Kennedy v. Long Island R. Co., 319 F. 2d 366 (2d Cir., 1963)	8
Norfolk So. Bus Corp. v. Virginia Dare Transp. Co., 159 F. 2d 306 (4th Cir., 1947)	7
Northern Pacific Ry. Co. v. United States, 356 U. S. 1 (1958)	5
Pan American World Airways v. United States, 371 U. S. 296 (1963)	4, 5
Parmelee Transp. Co. v. Keeshin, 292 F. 2d 794 (7th Cir., 1961)	9

Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U. S. 500 (1936) 9

Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266 (1926) 4

Toledo, P. & W. R. Co.—Trackage Rights Acquisition, I. C. C. Finance Docket No. 19922 (1958) 1, 3

Transfers of Freight within St. Louis and East St. Louis by Dray and Truck for and on Behalf of Railroads, 155 I. C. C. 129 (1929) 9

United States v. Loew's Inc., 371 U. S. 38 (1962) 8, 9

United States v. Terminal R. Ass'n of St. Louis, 224 U. S. 383 (1912) 8, 9

United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897) 5

United States v. Joint Traffic Ass'n, 177 U. S. 505 (1898) 5

Statutes.

Federal Aviation Act, Section 411, 49 U. S. C. § 1381 .. 5

Interstate Commerce Act, 49 U. S. C. § 1 et seq.

Section 1(18) 49 U. S. C. § 1(18) 4

Section 5(1) 49 U. S. C. § 5(1) 6, 7

Section 5(2) 49 U. S. C. § 5(2) 4, 6

Section 5(8) 49 U. S. C. § 5(8) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 598

PEORIA AND PEKIN UNION RAILWAY COMPANY, a corporation, ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, PEORIA AND EASTERN RAILWAY COMPANY, a corporation, CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY, a corporation, and UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee of Peoria and Pekin Union Railway Company First Mortgage dated January 1, 1950, *Petitioners*,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Respondent*.

PETITIONERS' REPLY BRIEF.

I. NORTH WESTERN'S "RESTATEMENT OF THE CASE."

North Western's recasting of the facts and arguments below is misleading, incomplete and inaccurate.

1. North Western says that P&PU attempted, both before the Interstate Commerce Commission (in *Toledo, P.&W. R. Co.—Trackage Rights Acquisition*, I. C. C. Finance Docket No. 19922, Joint Appendix 96, called by North Western "the *Sommer* case") and in the District Court below, to prevent North Western from serving "certain industries near Sommer with its own trains" on the ground, apparently, that these industries were located in a "for-

bidden area" ("Brief for the Respondent in Opposition," hereafter "NW Brief," p. 3, lines 4, 12, 18).

The statements made as to the existence of a "forbidden area" are without any basis in fact. Apparently North Western is seeking to create the impression that petitioners rely upon Paragraph (FF) of the contract (Joint Appendix 188, lines 9-14), which is the only provision reserving to P&PU "local freight" traffic between points on P&PU's line. P&PU claims no rights under Paragraph (FF) relevant to any issue in this case. Inasmuch as the industries near Sommer are served only by North Western, and have never been served by P&PU, P&PU did not raise Paragraph (FF), either before the Commission in the *Sommer* case* or in this case (P&PU's Answer to North Western's Interrogatory 11; Joint Appendix 146). It did and does rely on Paragraphs Fourth and (AA) (Joint Appendix 146), which advert to intermediate switching between North Western and other trunk lines and industrial switching between North Western and industries served by P&PU.

The "forbidden area" argument, like the "raw horizontal price fixing" argument (NW Brief p. 3), has no basis in the record in this case and serves only to confuse the issue as to whether or not petitioners are entitled to certiorari.

2. North Western has repeatedly, and erroneously, argued that P&PU once characterized the contract as one "for pooling." (NW Brief 3, lines 20-21). The fact is that in answering a complaint alleging only that direct interchange did not breach the contract, validity not being in question, P&PU said: "[P&PU] was conceived and organized by the parties to that [1881] contract . . . for pooling their switching operations . . ." (Joint Appendix 36).

* See testimony of P&PU President Willingham in *Sommer* case, Transcript 701-703, Finance Docket No. 19920, of which we ask this Court to take judicial notice. Mr. Willingham said that P&PU was invoking only Paragraphs Fourth and (AA).

The context reveals that the word "pooling" was used in a non-technical sense, as a synonym for "consolidating," and not as a word of art, as it is employed in section 5(1). Neither of the courts below paid any heed to North Western's effort to gain some advantage from using the quoted phrase out of proper context, nor should this Court.

3. North Western says that "the I.C.C. in the *Sommer* case left resolution of the contract question for the District Court below" as if the Commission there ruled that the pooling question were for the courts. (NW Brief 3, lines 21-23. This idea is more expressly stated in NW Brief 6). The fact is that when the Commission approved construction and operation of the crossover track at Sommer, the only issue then in existence involving the contract was whether "the interchange of traffic at Sommer would be in violation of its agreement. . . ." (Joint Appendix 116). North Western waited until after the Commission had acted to raise the pooling question. It is important to understand just what issue was before the Commission because North Western later argues that the Commission referred to the District Court "the enforceability" of the contract (NW Brief 6), thus confusing the separate questions of breach and validity.

4. North Western says that the courts below made "two concurrent findings of fact" (NW Brief 10) that North Western and P&PU "are active competitors" for North Western's switching traffic to and from TP&W, and that "it is now too late to challenge these concurrent findings," (NW Brief 4). The fact is that in summarily holding that the alternative of self-service rendered North Western a "competitor" of P&PU for North Western's business, the District Court said it based its decision "upon admitted facts" (201 F. Supp. at 251, Joint Appendix 318). As this Court has said: "If the facts are agreed, the question is

one of law" *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 274 (1926). The question of competition thus became a question of law, reviewable here.

5. North Western says that the "I.C.C. has never granted its approval under Section 5(1)." (NW Brief 4). This fact, while true, does not avoid the applicability of this Court's reasoning in *Pan American World Airways v. United States* ("*Panagra*"), 371 U. S. 296 (1963) (see Petition for Certiorari 13-15). North Western's effort (NW Brief 7, second paragraph) to sidestep the issue by referring to proposed extension cases under § 1(18) ignores the crucial difference in statutory law: The Commerce Act gives the courts jurisdiction to enjoin unauthorized extensions "at the suit of . . . any party in interest," see *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., supra*, 270 U. S. at 270. North Western has not pointed to any provision of the Commerce Act giving to a court comparable jurisdiction to enjoin unauthorized pooling at the suit of a private party. Compare Section 5(8), 49 U. S. C. § 5(8), which refers only to "the complaint of the Commission . . ."

Moreover, the relevant "fact" is that in 1946 the Commission at North Western's request granted its approval under section 5(2). North Western is in the position of a party which has obtained approval for a transaction in a Commission proceeding and now in this collateral proceeding attacks the basis, terms and limitations of a Commission authorization which it sought and obtained. Such collateral attacks have been uniformly forbidden by this Court, cf. *Andrew C. Nelson, Inc. v. United States*, 355 U. S. 554, 561 (1958).

II. NORTH WESTERN'S SUPERSESSION ARGUMENT.

North Western misstates Petitioners' position as arguing that antitrust law "has been superseded as to all activities of regulated railroads" (NW Brief 7). Petitioners urged only that supersession is co-extensive with regulation, thus preventing head-on collisions between inconsistent philosophies (Petition 14-16).

The decisions cited by North Western demonstrate that this has been this Court's consistent position. Thus, in *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 445 (1945), this court upheld the state's cause of action explicitly because "the relief which Georgia seeks is not a matter subject to the jurisdiction of the Commission." And in *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 314-15 (1897), the Commerce Act was not involved, the court saying: "if the agreement be legal it does not owe its validity to any provision of the Commerce Act and if illegal it is not made so by the Act." *Accord*, *United States* v. *Joint Traffic Ass'n*, 177 U. S. 505, 573-78 (1898). Finally, *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1 (1958), involved a railroad's practices in the sale of its noncarrier real estate, a subject well beyond the Commission's purview.

North Western seeks to avoid *Panagra* (NW Brief 8) by pointing to Section 411 of the Aviation Act, 49 U. S. C. § 1381, but to no avail, since it has alleged only unauthorized "pooling" and not "unfair methods of competition." The subject matter of this law suit at its present stage is entirely within the jurisdiction of the Commission, as North Western admits (NW Brief 6: the "I. C. C. could well have approved pooling under Section 5(1) in the 1946 proceeding").

Having conceded this point North Western is forced

into an absurdity, arguing that the "I. C. C. has no competence to . . . hold unenforceable any contracts" (NW Brief 6, footnote 26). This cannot be so. The Commission may not have jurisdiction to decide "contract" questions, but it can authorize acts which breach a contract and thereby eliminate specific performance as a remedy, see *Gulf, M. & O. R. Co.* v. *Illinois Central R. Co.* 225 F. 2d 816 (5th Cir. 1955) (Petition 35). And the Commission can enter a cease and desist order against acts which violate the Commerce Act, even if obedience might involve abrogation of a contract, see *Gallagher* v. *Pennsylvania R. Co.*, 160 I. C. C. 563 (1929), discussed in *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 506 (1936).

The Commission decisions cited by North Western (NW Brief 6, footnote 26) did not involve questions of the applicability of the Commerce Act to the performance of acts in execution of contracts and do not support North Western's innuendo that the Commission has ever abdicated its responsibility to administer the Commerce Act.

North Western argues (NW Brief 7, 1st paragraph) that it would "be a useless act" to refer to the Commission for "approval of pooling." This begs the question, which is whether there is pooling at all. It would not be "useless" to find out what the Commission thinks it did in 1946 when it approved extension of the contract on the same terms as before under section 5(2). Nor would it be useless to find out what the expert agency entrusted in the first instance with administration of the act thinks of the applicability of section 5(1) to the facts of this case. North Western's argument boils down to saying that a plaintiff lacks standing to sue because he might not win.

III. NORTH WESTERN'S POOLING ARGUMENT.

First, North Western (NW Brief 5, lines 2-3) ignores Petitioners' argument that "the question of pooling is . . . reserved in the first instance exclusively for the Commission by the Commerce Act" (See Petition 11, lies 9-11).

Second, the logical inconsistencies of North Western's pooling argument are exposed by comparison of a definition of pooling quoted by North Western and accepted by P&PU (NW Brief 5, lines 5-11) with language from the decision below illustrative of the theory of pooling foisted upon the courts below by North Western (NW Brief 5, lines 12-23).

Pooling involves a sharing or division of a market, with each "partner" enjoying "a certain proportion of the business of the territory they compete for" (NW Brief 5, lines 8-9). But in the contract at issue (according to North Western, NW Brief 5, line 18) North Western agrees "not to compete in P&PU's area" at all.*

Petitioners will not repeat their extended analysis of the limited scope of section 5(1) in the context of the other subsections of section 5 (Petition 22-28). But certainly the decisions cited by North Western contradict its boast that "every circuit which has ever ruled upon this [pooling] question" has held that "the conduct required by these challenged provisions [that is the complete "surrender" of all the business and all the revenue] clearly constituted pooling of competing railroad services" (NW Brief 5). In *Norfolk So. Bus Corp. v. Virginia Dare Transp. Co.*,

* Petitioners do not agree that this is the proper construction of the contract, which delegates to P&PU North Western's switching requirements for its own account, but would not prevent North Western from holding itself out to switch for other carriers for their accounts. Petitioners will assume the existence of a "competitive" relationship, however, for the purposes of this portion of the case.

159 F. 2d 306, 309 (4th Cir. 1947), the agreement in issue was deemed valid on its face, but there was testimony (improperly excluded) showing "that Virginia Dare was to be allocated one-third and Norfolk Southern two-thirds of the net business . . ." for which they had theretofore competed. *Kennedy* v. *Long Island R. Co.*, 319 F. 2d 366 (2d Cir. 1963), held that section 5(1) did not apply to a strike insurance agreement. Similarly North Western can say "I. C. C. decisions likewise compel this conclusion" (NW Brief 6) but it does not and cannot cite any such decisions.

If anything remains clear after North Western's successful effort to convince the courts below that its novel theory of "pooling" can be crammed into the classical mold, it is that there are no decisions which support its theory, that the decision below makes new law, and that it would assist efficient and just administration of section 5(1) were this court to speak on the issue presented.

IV. NORTH WESTERN'S ANTITRUST ARGUMENT.

North Western's main antitrust arguments (NW Brief 10-11) need no further rebuttal because they depend upon the misstatements and half-truths already exposed. For example, North Western's "market division" argument stands or falls on its novel theory of competition. Its "price fixing" argument depends upon a contract provision (Paragraph (FF)) not involved in this case (see Petition 35, footnote). And North Western still argues "tying" despite its inability to show compulsion (see Petition 33).

There is, however, one aspect of North Western's argument which should be noted. It confuses the remedy with the *ratio decidendi* in *United States* v. *Terminal R. Ass'n of St. Louis*, 224 U. S. 383, 411 (1912) and *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962), by citing these decisions

as "dispositive on this element" (NW Brief 11). In the *St. Louis Terminal* case, this Court did not hold the exclusive dealing provision to be illegal *per se*. This Court did find that flagrant abuse of that and other otherwise legitimate provisions, in furtherance of an anticompetitive conspiracy, tainted the whole arrangement. Faced with a similar problem in *Loew's*, this Court said (371 U. S. at 53):

> Some of the practices which the Government seeks to have enjoined . . . are acts which may be entirely proper when viewed alone. To ensure, however, that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined.

By contrast, in the instant case, there was no mention below of "acts" by P&PU "found to be illegal" and no basis in the record that any such "acts" exist. The District Court completely ignored the necessity for an evidential foundation and struck down the "otherwise permissible" exclusive-dealing provisions in P&PU's contract on a *per se* basis.

This Court has never held that exclusive-dealing arrangements are illegal *per se*, cf. Petition 37, especially *Parmelee Transp. Co.* v. *Keeshin*, 292 F. 2d 794, 803 (7th Cir., 1961). And the Commission has specifically approved exclusive-dealing provisions in the face of attack grounded in antitrust principles, cf. Petition 20, especially *Transfers of Freight within St. Louis and East St. Louis by Dray and Truck for and on Behalf of Railroads*, 155 I. C. C. 129, 140 (1929), discussed and approved by this Court in the connected case of *Central Transfer Co.* v. *Terminal R. Ass'n of St. Louis*, 288 U. S. 469, 471 (1933). The decision below therefore raises an important federal question.

CONCLUSION.

Petitioners submit (1) that the Commission had "plenary and exclusive" jurisdiction over the issues raised by North Western's summary judgment motion, (2) that the decisions below on the pooling and antitrust issues were incorrect and (3) that the decisions below on the issues of jurisdiction and on the merits are in direct and total conflict with applicable decisions by this Court and raise important federal questions. It is urged accordingly that a writ of certiorari to review the decision of the court below be granted.

Respectfully submitted,

EUGENE R. JOHNSON,
DONALD G. BESTE,
First National Bank Building,
Peoria, Illinois,

JESSE CHOPER,
Attorneys for Petitioner Peoria and Pekin Union Railway Company.

ROBERT S. KIRBY,
135 East 11th Place,
Chicago 5, Illinois,
Attorney for Petitioner Illinois Central Railroad Company.

JOHN M. ELLIOTT,
First National Bank Building,
Peoria, Illinois
Attorney for Petitioners Peoria and Eastern Railway Company and Chicago and Illinois Midland Railway Company.

W. S. BOCMAN,
STEPHEN L. SEFTENBERG,
120 West Adams Street,
Chicago 3, Illinois,
Attorneys for Petitioner United States Trust Company of New York, as Trustee.

Of Counsel:
MILLER, WESTERVELT & JOHNSON,
WILSON & MCILVAINE.